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No. 97 770

In The

Supreme Court of the United States

October Term, 1997

TEXACO, INC.,

Petitioner,

vs.

MATTHEWS SMITH, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal courts have the power to issue property-freeze injunctions when the affected property consists of documents and electronically stored information that may contain evidence relevant to a pending or anticipated civil action.

LIST OF PARTIES

The petitioner is Texaco Inc. Texaco Inc. does not have a parent corporation. Texaco Inc.'s nonwholly owned subsidiaries are Chemplex Construction Corporation, El Capitan Mutual Water Company, Four Star Oil + Gas Company, and Texaco NPI Holdings.

The named respondents are Matthews Smith, Karen Love, Darlene Greene, Kenneth Ford, John Lumpkins, and John Comeaux. Respondents also represent a putative class of similarly-situated persons.

Star Enterprise, co-defendant and co-appellant in the courts below, is also a named respondent.

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Petitioner Texaco Inc. ("Texaco" or "the Company") respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on June 3, 1997.

OPINIONS BELOW

The unreported opinion of the Fifth Circuit is set out at page 1a of the Appendix. The unreported decision of the court of appeals denying rehearing and rehearing *en banc* is set out at pages 21a-22a of the Appendix. The district court's January 2, 1997 opinion and order granting a preliminary injunction, which is reported at 951 F. Supp. 109 (E.D. Tex. 1997), is set out at pages 2a-15a of the Appendix. The district court's unreported "document-preservation order," dated March 4, 1997, is set out at pages 16a-20a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the Fifth Circuit was entered on June 3, 1997. Texaco's petition for rehearing was denied on August 5, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTE INVOLVED

Respondents sued under 42 U.S.C. § 1981 and 42 U.S.C. § 2000e *et seq.* But interpretation of those statutes is not the concern of this certiorari petition, which seeks review of ancillary property-freeze injunctions entered by the district court and affirmed by the Fifth Circuit. Neither court identified by what authority the disputed orders were entered.

STATEMENT OF THE CASE

The district court entered an injunction (which was subsequently stayed by the Fifth Circuit), then later a nearly identical order, enjoining Texaco, *pendente lite*, from altering or disposing of what is indisputably its own property: existing and future documents and electronically stored information. No statute or rule of civil procedure grants courts the authority to enter such property-freeze injunctions, and opinions of this Court place them beyond the farthest reach of the courts' equitable powers.

On December 6, 1996, Smith obtained an *ex parte* temporary restraining order from a state judge in Jefferson County, Texas; the order required Texaco, as well as its affiliate and co-defendant, Star Enterprise ("Star"), to retain, unaltered, a vast array of existing and future information concerning their employment practices. I R. 6-10, 14-15, 22-25.[1] Because the application made allegations that could support claims arising under only 42 U.S.C. § 1981 or Title VII of the Civil Rights Act of 1964, Star removed the action to the United States District Court for the Eastern District of Texas, Beaumont Division, on December 10; Texaco joined in that removal. I R. 1-3, 41.

On January 2, 1997, the district court issued a memorandum opinion and an order granting a preliminary injunction against Texaco. (App. 2a-15a). The injunction prohibited Texaco from moving, altering, or destroying any documents or electronic media "involved in" the discriminatory practices alleged by Smith. (App. 3a). Texaco filed a motion to stay the preliminary injunction on January 9. I R. 199-207. Smith filed a response to Texaco's motion to stay on January 23. I R. 225-236. Nine

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1. The abbreviation "R." refers to the record filed below; "SR." refers to the supplemental record. The preceding Roman numeral refers to the volume. The subsequent Arabic number designates the page.

minutes after Smith filed his response, the district court entered an order denying Texaco's motion for stay because granting them

> would permit the defendant Star to continue to transfer defendants' Texaco files beyond the jurisdiction of this court [to Texaco's Oklahoma storage facility], and make them, as a practical matter, virtually inaccessible to plaintiff and those similarly situated.

I R. 238-41.

On February 4, Smith filed his first amended complaint, alleging only section 1981 claims against Texaco and Star. I SR. 21-36. That same day Texaco filed with the Fifth Circuit a motion to stay the preliminary injunction or, in the alternative, to expedite the appeal of the order granting the injunction. While Texaco's motion to stay the preliminary injunction was pending, Smith filed a motion for a "document-preservation order" ("Motion"). I SR. 37-40. The Motion asked the district court to enter an order with language identical to that contained in the preliminary injunction and to style the relief as an "order" rather than as a "preliminary injunction." Before the district court acted on the Motion, the Fifth Circuit entered an order staying the preliminary injunction. I SR. 41-42.

On March 4, the district court entered an order requiring Texaco to preserve documents "related to" this action. (App. 16a-20a). Texaco filed notice of its intent to appeal that order, and later filed a motion asking the Fifth Circuit to stay the order and to consolidate that order's appeal with the appeal of the preliminary injunction. I SR. 155-156.

With the "document-preservation order" safely in place, Smith moved, on March 19, to dissolve the preliminary injunction. I SR. 175-177. On the morning of March 21 Texaco's

counsel notified the district court by telephone that the Company wished to respond to the motion to dissolve. At approximately 1:00 p.m. the same day, Texaco received by facsimile transmission a copy of the district court's order both conditionally granting the motion to dissolve and referring that motion to the Fifth Circuit. I SR. 191-192. The Fifth Circuit subsequently entered an order that consolidated the appeal of the "document-preservation order"[2] with the appeal of the preliminary injunction, denied Texaco's motion to stay, and expedited the appeal.

The Fifth Circuit heard oral argument on June 3, 1997. The panel ruled from the bench, affirming the district court. A one-word per curiam opinion — "Affirmed" — issued later that day. (App. 1a). A timely suggestion for rehearing *en banc* was denied on August 5, 1997. (App. 21a-22a).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT.

The ability to levy taxes and raise an army would unquestionably assist a district court in disposing of the business that comes before it. But a court lacks the *power* to take those actions. For the same reason, the district court could not validly enter the disputed property-freeze injunctions. That such injunctions can be rationalized as convenient, or as likely to improve the accuracy of adjudication, is not enough to expand the federal courts' historically constrained equitable powers.

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2. Texaco contended below, and the court of appeals evidently accepted, that the "document-preservation order" is in substance an injunction. Texaco will hereafter refer simply to the "injunctions."

When the property at issue is not itself the subject of the underlying litigation, an order prohibiting its free enjoyment *pendente lite* is facially invalid. This Court held as much in *De Beers Consolidated Mines v. United States*, 325 U.S. 212 (1945). The *De Beers* holding applies fully to the property-freeze injunctions at issue here.

In *De Beers*, this Court reviewed under the All Writs Act, and vacated as a "usurpation of power" by the district court, an injunction, entered at the outset of the action, that ordered the defendants not to move, transfer, or dispose of certain of their property until the lawsuit was over. 325 U.S. at 222-23. The Court held that the injunction was not authorized either by statute or the "usages of equity" and so was unlawful without regard to whether it satisfied the normal requirements for the issuance of an injunction. *Id.*

De Beers recognized only two exceptions to the general rule that a court may not freeze a litigant's property simply because a lawsuit is pending: when the injunction "deals with property which can be dealt with in any final injunction" and when the injunction "grant[s] intermediate relief of the same character as that which may be granted finally." *Id.* at 220. Neither exception applies here. Smith and the other plaintiffs do not assert any ownership or other property interest in the documents covered by the orders, or that any such interest will arise by virtue of the action. Nor does the underlying litigation question Texaco's right (after the litigation is over) to create, modify, and dispose of whatever documents or electronically stored information it chooses. Smith's lawsuit seeks monetary damages and promotional opportunities, not the right to tell Texaco how to manage its information-storage tools. Consequently, the Fifth Circuit's decision to affirm the district court could not have rested on the conclusion that the injunctions fall within either exception to *De Beers*.

Moreover, the disputed injunctions cannot be distinguished in any legally significant way from the injunction invalidated in *De Beers*. The purpose of the injunction there was to ensure that the eventual judgment or decree of the court could be carried out: that any judgment entered would be enforceable. Yet, even that indisputably important goal — meaningful adjudication — did not in this Court's view confer a general equitable power to freeze litigants' assets. In this case, the district court entered the injunctions presumably to safeguard the court's factfinding function. But no reasoned basis exists for concluding that the mere possibility of improved accuracy in adjudication confers broader equitable power than the interest found wanting in *De Beers*.

In fact, although *De Beers* found the defendants' property interest alone sufficient to override the countervailing concern with meaningful adjudication, Texaco's interest in its documents and electronically stored information includes, but also transcends, property. As this Court has recognized, the requirement to disclose information in civil litigation "may seriously implicate privacy interests of litigants and third parties." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984). Privacy includes "the right to refrain from speaking. . . ." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The discovery rules, for example, validly limit privacy rights of litigants only to the extent necessary for effective prosecution or defense of the civil action. *Seattle Times*, 467 U.S. at 34-35. Because compelled retention increases the probability of eventual compelled disclosure, Texaco's privacy *and* property interests in its documents and electronically stored information are actually weightier than the property right involved in *De Beers*.

The continued vitality of *De Beers* is not in question. In *ITT Community Development Corp. v. Barton*,[3] for example, the

3. 569 F.2d 1351, 1360-61 (5th Cir. 1978).

Fifth Circuit applied *De Beers* to reverse a so-called turnover order, issued originally in the form of an injunction, that required the defendants to place some of their property in the registry of the court pending the final outcome of the case. Later, in *In re Fredeman Litigation*,[4] that court applied both *De Beers* and *Barton* to invalidate an injunction that "froze" some of the defendants' property pending the outcome of the case — notwithstanding allegations that the defendants were "scoundrels" who would go to any lengths to avoid satisfying whatever judgment was ultimately entered against them. In fact, the Fifth Circuit has not only properly analyzed *De Beers* on several occasions, it has also correctly pointed out that if sufficient need for a particular type of property-freeze injunction exists, the solution is congressional action to authorize by statute what would otherwise be beyond the courts' equitable powers.[5] This Court has recognized that same principle for more than thirty years.[6] But no existing statute or rule of civil procedure contemplates property-freeze injunctions of the type at issue here.

Smith suggested below that the Eastern District's Civil Justice Expense and Delay Reduction Act Plan ("the Plan") — enacted pursuant to the Civil Justice Reform Act of 1990

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4. 843 F.2d 821, 824-25 (5th Cir. 1988); *see also Federal Savings & Loan Ins. Corp. v. Dixon*, 835 F.2d 554 (5th Cir. 1987).

5. *In re Fredeman Litigation*, 843 F.2d at 828.

6. *See United States v. First City Nat. Bank*, 379 U.S. 378 (1965) (upholding asset-freeze injunction authorized by section 7402 of the Internal Revenue Code); *accord FDIC v. Faulkner*, 991 F.2d 262 (5th Cir. 1993) (upholding asset-freeze preliminary injunction entered pursuant to the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990).

("CJRA")[7] — authorized the district court to enter the injunctions. But neither the Plan nor the CJRA mentions property-freeze orders of any kind. Nor is there any basis for inferring the power to enter property-freeze injunctions from either the CJRA or the Plan.[8]

The Federal Rules of Civil Procedure likewise do not authorize such injunctions. No Rule mentions enjoining the preservation of documentary evidence,[9] and the Rules most consistently proffered as justification for the injunctions — Rules 26, 34, and 37 — are no exception. Rule 26 discusses the methods and scope of discovery. Rule 34 governs only the *production* of documents; it does not sanction injunctive relief in any form. Rule 37 at least authorizes certain kinds of orders related to discovery, but the injunctions entered below were indisputably not "discovery orders."

> Traditionally, discovery orders resolve conflicts arising when a party, through the use of one of the enumerated discovery devices, seeks to gain information from an adverse party or a third person. A, for example, propounds an interrogatory to B; dissatisfied with the response — it seems incomplete, or evasive, or simply never materializes — A asks the judge to order that proper response be served.[10]

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7. 28 U.S.C.A. §§ 471-482 (1993 & Supp. 1997).

8. *See Ashland Chemical, Inc. v. Barco, Inc.*, 123 F.3d 261, 268 (5th Cir. 1997) (noting that the CJRA does not authorize enactment of rules that are outside "the tenor of the CJRA's own specific provisions. . . .").

9. *See* Fed. R. Civ. P. 26-37; *cf.* Fed. R. Civ. P. 27(a) (authorizing pre-action deposition to preserve *testimony*).

10. *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1012 (1st Cir. 1988).

The district court's injunctions are not such orders. They are not the end result of a discovery dispute. And even the district court made perfectly plain that its "document-preservation order" is not a *discovery* order:

> None of the three orders shall be considered by the parties or by this court a motion to produce any of the 'Preserved Documents,' or requiring any discovery *until a discovery order* is entered by the court after either agreement of the party, or upon motion and hearing, if necessary.

(App. 16a) (emphasis added).

In the Court of Appeals respondents' counsel suggested that Rule 16(c)(12)[11] allows property-freeze injunctions in "complex" cases. Rule 16(c)(12) does refer to special procedures necessary to manage complex litigation. It does not mention property-freeze injunctions. In any event, documents are no less important in simple than in "complex" cases, and there is no reason to believe that documents are more likely to be destroyed in "complex" litigation. Rule 16 no more authorizes property-freeze injunctions than does the CJRA.[12]

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11. Rule 16(c)(12) provides that "a court may take appropriate action, with respect to . . . (12) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems." Fed. R. Civ. P. 16(c)(12).

12. Even a passionate proponent of increased protections against document destruction has characterized the argument that the power to enter "document-preservation orders" can be distilled from the Federal Rules of Civil Procedure as follows: "on the edge of doctrinal respectability"; "procedural chicanery"; "transparent effort by the court to manipulate the text of the rule to satisfy its goals"; "defeats one of the primary purposes behind the Federal Rules and their authorizing

(Cont'd)

The principal "authority" cited below, and the true provenance of most recent evidence-freeze orders, is the MANUAL FOR COMPLEX LITIGATION ("Manual"). (App. 16a, 24a). But the Manual, by its own account, is neither "a treatise on matters of substantive or procedural law" nor "intended for citation as authority on points of law or as a statement of official policy."[13] Moreover, the Manual does not address specifically the statutory authority for such orders, confining itself instead to this general observation:

> Although not without limits, the court's express and inherent powers enable the judge to exercise extensive supervision and control of litigation. The Federal Rules of Civil Procedure, particularly Rules 16, 26, 37, 42, and 83, contain numerous grants of authority that supplement the court's inherent power to manage litigation. Fed. R. Civ. P. 16(c)(12) specifically addresses complex litigation, authorizing the judge to adopt "special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems."[14]

But as noted above, none of the specific Rules cited by the Manual discuss document-preservation injunctions. Perhaps

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(Cont'd)
legislation, the Rules Enabling Act of 1934"; "courts are forced to search among obscure doctrines for scraps of precedent to support their holdings"; "strained"; "[t]he legal obligation of document retention defined by this process is uncertain and unintelligible." Dale A. Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185, 1222, 1224-25, 1231, 1239 (1983).

13. Manual, § 10.2, at 5 (3d ed. 1995).

14. Manual, at 10 (footnote omitted).

most significantly, the Manual does not acknowledge the conflict between the "document-preservation order" it suggests and this Court's decisions. The Manual's recommended "document-preservation order" is written in the form of an injunction.[15] Yet the Manual never mentions *De Beers* or its limitation of the courts' injunctive powers to those sanctioned by traditional usages of equity.

The purpose of the property-freeze injunctions was no doubt the worthy one of ensuring that as much relevant evidence as possible is available to the district court. But a district court is not free to squeeze even a useful power from every worthy goal. Until Congress — or this Court under its rulemaking authority — decides that the value of the goal outweighs the interference with the privacy and property rights of the litigant, the courts have no more power to issue property-freeze injunctions when the assets are documents or computer tapes than they do when the assets are cash or mining equipment.

II.

THIS CASE PRESENTS AN ISSUE OF SUBSTANTIAL IMPORTANCE TO THE CIVIL JUSTICE SYSTEM.

The validity of property-freeze injunctions aimed at documents and other putative evidence affects the entire civil justice system and is squarely at issue in this case. Given the apparent steep escalation in the use of such injunctions, this Court should issue a writ of certiorari to settle an important question concerning the power of federal courts.

Until relatively recently, virtually all courts recognized that one party's fear that potentially relevant documents in the

15. Manual § 41.34 (sample order using language such as "restrained and enjoined.")

possession of the opposing party would be lost or destroyed did not justify equitable relief. As one court put it:

> [w]ere the fact that a party to a law suit would suffer irreparable injury if a document were destroyed the sole test for the issuance of an injunction to prevent its destruction, injunctions should issue in every case in which important documents are within the control of either party. Obviously, this is not done and should not be done.

Humble Oil & Ref. Co. v. Harang, 262 F. Supp. 39, 42-43 (E.D. La. 1966). The court in *Harang* could describe its conclusion as "obvious" because it followed faithfully a centuries-old understanding of the limits on the equitable powers of federal district courts.[16] The same understanding underlay this Court's ruling in *De Beers*.

Adherence to *De Beers* and traditional limits on equity jurisdiction by no means rendered courts impotent when confronted with destruction of relevant evidence. Courts unquestionably have the authority in such situations to take curative actions up to, and including, dismissal or a default judgment.[17] Most commonly they draw, or allow a jury to draw, an adverse inference from so-called "spoliation" of evidence. Courts in the United States adopted the adverse-inference doctrine from English chancery practice,[18] and the Equal

16. *See Harang*, 262 F. Supp. at 43.

17. *See Shepherd v. American Broadcasting, Inc.*, 62 F.3d 1469, 1484 (D.C. Cir. 1995); *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 78-79 (3rd Cir. 1994); *Uniguard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992); *Pressey v. Patterson*, 898 F.2d 1018, 1022 (5th Cir. 1990).

18. *See Gaines v. Chew*, 43 U.S. (Howe) 619, 629 (1844) (explaining that at English common law the power of chancery extended to drawing an adverse inference because of the spoliation of papers).

Employment Opportunity Commission adopted it to aid in enforcement of the employment discrimination laws.[19]

But recently a number of courts have evidently lost faith in the adverse-inference doctrine. Or perhaps the proliferation of evidence-freeze orders and injunctions can be attributed to their endorsement by the influential Manual. Whatever the reason, many courts now routinely enter evidence-freeze injunctions indistinguishable from the injunctions at issue here.[20] In fact, some district courts apparently view document-freeze orders as so uncontroversial that they include them in routine scheduling orders.[21] Yet, no reported decision has addressed the legal basis

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19. Where a respondent knowingly destroys or knowingly fails to maintain records in anticipation of filing the charge, or because of a Commission investigation, or otherwise with the intent to defeat the purposes of Title VII, the EOS can recommend drawing an "adverse inference" that the information destroyed or not maintained would have been unfavorable to the respondent. This adverse inference can be used, as to the evidence sought, to establish facts relevant to a determination on its merits.

EEOC COMPLIANCE MANUAL § 632.3(b)(2)(ii). *See also* 29 C.F.R. § 1602.14.

20. *See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litigation*, 169 F.R.D. 598, 600 (D.N.J. 1997); *In re Orthopedic Bone Screw Prods. Liability Litigation*, 1995 WL 925978, * 1-2 (E.D. Pa. Sept. 13, 1995); *HJB, Inc. v. American Home Products Corp.*, 1994 WL 31005, * 1, n.1 (N.D. Ill. Feb. 1, 1994); *Pepsi-Cola Bottling Co. v. Cargill*, 1995 WL 783610, *3 (D. Minn. Oct. 20, 1995) (considering, but rejecting, motion for document-preservation order); *In re Potash Antitrust Litigation*, 1994 LEXIS 20836, * 30 (D. Minn. Dec. 5, 1994) (same); *see also* Lawrence B. Solum & Stephen J. Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085 (1987); Oesterle, 61 TEX. L. REV. at 1222, 1224-25.

21. *See In re Prudential Ins. Co. of Am. Sales Practices Litigation*, No. 95-4704 (D.N.J. Sept. 15, 1995) (Scheduling Order) (set out at pages 21a-34a of the Appendix).

for the orders, much less the implications of *De Beers* and its progeny for their validity.

More disturbingly, neither the courts nor the commentators have taken any notice of the most substantial cost to the civil justice process of giving courts the power to fine or jail litigants who fail to preserve relevant evidence: the incentive it creates for litigants to try an opponent's evidence-preservation efforts rather than the merits of the action. Here, for example, it would be far easier to prove that one or two of Texaco's thousands of far-flung employees failed to preserve some documents or electronically stored information arguably "related to" the plaintiffs' as yet ill-defined claims than it would be to prove intentional race discrimination. And the psychic satisfaction of deposing all of Texaco's top managers about the company's document-management practices, then making the company pay for the exercise, for some could nearly equal the satisfaction of remedying alleged race discrimination.

The example is not fanciful or hyperbole. In *Prudential*,[22] technical violations of the court's document-preservation order resulted in extensive ancillary proceedings involving fifty-two depositions (including ones of all of the defendant's senior officers), a detailed order revising and editing the defendant's document-preservation policies, shifting all costs of the ancillary proceedings to the defendant, and imposing a $1,000,000 fine.[23]

The *Prudential* case may be the most recent and telling example of the phenomenon, but it is by no means the only evidence of it. The federal discovery rules have been amended three times, in 1980, 1983, and 1993, to "deal with the problem

22. *See In re Prudential Ins. Co. of Am. Sales Practices Litigation*, 169 F.R.D. 598 (D.N.J. 1997).

23. *Id.* at 601, 616-17.

of overdiscovery."[24] As the Advisory Committee explained in 1983:

> The objective is to guard against redundant or disproportionate discovery . . . [and] to encourage judges to be more aggressive in identifying and discouraging discovery overuse. . . . The Court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.

The aspirational standards adopted in 1983 proved inadequate to bridling "overdiscovery": the 1993 amendments therefore adopted more extreme measures still. But a recent independent study concluded that the 1993 measures, at least to the extent that it was hoped that aggressive case management by itself would reduce litigation cost and delay, have not worked either.[25]

The history of Rule 11 is equally illustrative.[26] In 1993 the Rule was amended "dramatically . . . to reduce the litigation that the prior rule had generated."[27] Of particular relevance here, a new subdivision (d) was added to remove from the ambit of the Rule all discovery issues. A principal concern addressed by the revisions was the incentives created by the Rule "for many unnecessary Rule 11 motions."[28] In substance the problem was

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24. Fed. R. Civ. P. 26, *Advisory Committee Note to 1983 Amendments*.

25. Rand Corporation, *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* (1997).

26. Fed. R. Civ. P. 11.

27. 5A CHARLES A. WRIGHT *ET AL.*, FEDERAL PRACTICE AND PROCEDURE § 1331, at 2-4 (Supp. 1996).

28. *See* 146 F.R.D. 524 (1993).

this: given even a little encouragement to pursue another litigant or his counsel for misconduct, so many parties leapt at the chance that the real business of the courts was being impeded.

There is no reason to believe that the abuses that nearly sank Rule 11 will be any less prevalent if the newest weapon in the litigator's arsenal offers the prospect of both civil *and* criminal penalties. In short, evidence-freeze injunctions of the kind entered by the district court in this case open whole new vistas for time-consuming, expensive, and unproductive satellite litigation — vistas that litigants have shown they are all too ready to explore. This Court should exercise its oversight responsibilities for the civil justice system to resolve finally the question of the power of a district court to enter such injunctions.

* * *

There is no *right* to destroy documents relevant to pending civil litigation, and Texaco is not arguing otherwise. The question is whether district courts are vested with the *power* to enter property-freeze injunctions. Put another way, the question is whether the importance of documents and electronically stored information to civil adjudication requires or permits *criminalizing* a litigant's failure to preserve them when they may be relevant to a pending action. "Criminalizing" is not too strong a word, for a federal statute makes it criminal contempt in certain circumstances to impede or resist an order of a federal court, even if it was made in a civil action between two private parties.[29]

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29. 18 U.S.C. § 401(3). *Compare Richmark Corp. v. Timber Falling Consultants, Inc.*, 730 F. Supp. 1525, 1532 (D. Ore. 1990) (absent a court order or subpoena, withholding or concealing documents in a civil action not obstruction of justice in violation of 28 U.S.C. § 1503); *Millinocket Theatre, Inc. v. Kurson*, 39 F. Supp. 979 (D. Me. 1941) (destruction of documents relevant to civil action not contempt of court). *See also* Oesterle, 61 TEX. L. REV. at 1201, 1205-06 & nn. 82-83.

Plaintiffs usually can choose when to commence a lawsuit and what averments they intend to make. Those tactical advantages would permit unhelpful documents to be "routinely" disposed of before the action commences in such a way that proving the destruction was anything else is virtually impossible. But large corporations such as Texaco cannot function without documents and other communication tools, and typically they have no control over when or for what they are sued. Moreover, the practical difficulties presented by the need to interpret, disseminate, and police compliance with orders to preserve documents and electronically stored information to a worldwide workforce of more than 25,000 are daunting.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JUNE 3, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-40087
Consolidated with
No. 97-40295

MATTHEWS SMITH,

Plaintiff-Appellee,

v.

TEXACO, INC.; ET AL.,

Defendants,

STAR ENTERPRISES; TEXACO, INC.,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Texas
(1:96-CV-749)

Before WIENER and PARKER, Circuit Judges, and LITTLE, District Judge.*

PER CURIAM:**

AFFIRMED. See Local Rule 47.6.

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* United States District Judge for the Western District of Louisiana, sitting by designation.

** Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

APPENDIX B — PRELIMINARY INJUNCTION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION FILED JANUARY 2, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

NO. 1:96-CV-0749

MATTHEWS SMITH, ET AL

V.

TEXACO INC., TEXACO CHEMICAL COMPANY, AND STAR ENTERPRISE, INC.

PRELIMINARY INJUNCTION

The presiding judge of the 172nd District Court District Court of Texas entered a Temporary Restraining Order (TRO) without notice on December 6, 1996. On December 10, 1996, the defendants properly and timely removed this cause to this court, which set the matter for hearing at 2:00 p.m. on December 11, 1996, for possible modification or dissolution of the TRO, and set the hearing for a preliminary injunction to be held on December 20, 1996. The TRO entered by the state court remained in effect it was modified by this court. *Texas v. Wellington Resources Corp.*, 706 F.2d 533 (5th Cir. 1983).

The TRO entered by the state court, supported by affidavit, was modified on December 13, 1996. The parties agreed to continue the modified TRO in effect until the close of business January 3, 1997. The modified TRO is now dissolved, and a

preliminary injunction is hereby entered, based upon the facts as proved in the hearing, and for the reasons set forth in the Memorandum Opinion entered by this court on this date.

1. The defendants, Texaco Inc. and Star Enterprise, Inc. (including such defendants' agents, servants, representatives, insurers, and any other person or entity acting for or on behalf of said defendants, or any person having actual or constructive notice of this order) shall not destroy, alter, change, delete, or make any new notations on documents or electronic materials which were, in any way, involved in the discriminatory practices alleged by the plaintiffs. The defendants Texaco Inc. and Star Enterprise, Inc. (including such defendants' agents, servants, representatives, insurers, and any other person or entity acting for or on behalf of said defendants, or any person having actual or constructive notice of this order), may make any new additions or notations concerning payroll, or similar records which they have or will make in their usual and ordinary course of business. Defendants are moreover enjoined from moving documents or electronic materials which were, in any way, involved in any of the discriminatory practices alleged by the plaintiffs; except that, defendants may move certain documents or materials if doing so is necessary to advance the ordinary and usual business purposes of the defendants, as determined by both industry standards and any internal business standards or policies which defendants have previously imposed on themselves; provided, however, that any moving of such documents or materials shall not impair the plaintiffs' right to inspect such documents or materials, until further order of this court.

2. Any and all electronic communications involving the Human Resources Department of Star Enterprises shall be kept and not destroyed, unless hard paper copies are made and kept,

and the electronic tapes may be re-used as necessary. Such hard copies will be logged and indexed.

3. The defendants shall prepare and furnish logs of any and all documents which have been moved from Star-Port Arthur to Texaco at Tulsa, and any such records from Star's three other facilities in Louisiana, Delaware, and Georgia.

4. The defendant Star Enterprise shall log and index any and all records of employment changes in pay, benefits, promotions, changes of positions, demotions, or other pertinent employment decisions at all of its locations within the United States of America until further order of this court. All of these records (past, present, and future) shall be open to the plaintiff and his attorneys at mutually agreeable time during normal working hours upon five working days' notice. If the parties cannot mutually agree on such times for inspection, the court will set such times upon application of either party.

5. This order shall not become effective unless and until the plaintiff or his attorneys execute and file with the Clerk a bond, in conformity with law, in the amount of Fifty Thousand Dollars ($50,000) with a surety approved by the United States District Clerk, Eastern District of Texas, Beaumont, Texas. The bond shall be filed by the close of business January 7, 1997. If said bond is not so filed, this order is of no effect and the state court Temporary Restraining Order is dissolved, as is this temporary injunction.

SIGNED this 2nd day of January, 1997.

s/ Howell Cobb
HOWELL COBB
UNITED STATES DISTRICT COURT

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION FILED JANUARY 2, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

1:96CV749

MATTHEWS SMITH, ET AL,

PLAINTIFFS,

VS.

TEXACO, INC., TEXACO CHEMICAL COMPANY AND STAR ENTERPRISE, INC.,

DEFENDANTS

Memorandum Opinion

Before the court is Plaintiff Matthews Smith's (Smith) motion seeking to remand this case to state court, and defendants' Texaco, Inc. (Texaco) and Star Enterprise, Inc. (Star Enterprise) motions seeking to dissolve the temporary restraining order (TRO) previously entered by the state district court in this removed action pursuant to Fed. R. Civ. P. 65(b) and to deny a temporary injunction.

The court has conducted a preliminary injunction hearing and reviewed the parties' written submissions and oral arguments. For the reasons given below, both the plaintiff's and the defendants' motions will be denied.

Appendix C

Background

Plaintiff Smith is employed by the Human Resources Department at the Port Arthur, Texas refinery operated by Star Enterprise, previously owned by Texaco. On December 6, 1996, Smith obtained a TRO from state court, which enjoined defendants from moving, altering or deleting any records which might pertain to Smith's (personal and as an anticipated class representative) claims of employment discrimination against Star Enterprise (and possibly Texaco).

Star Enterprise was formed as a joint venture under New York partnership law on January 1, 1989. Star Enterprise is owned 50% by an indirect subsidiary of Texaco and 50% by Saudi Refining, Inc.

The state court TRO pertains to Texaco because Texaco shares all employee performance and appraisal records with Star Enterprises to determine seniority or when employees chose to switch employment between these two companies. This occurs with some regularity, but not on a scheduled basis.

Specifically, Smith alleges that Star Enterprise's facially neutral employee appraisal and promotion system discriminates against him and other African-American employees. At the preliminary injunction hearing held before this court, it was determined that of about 50 people at Star Enterprise's nationwide human resources group only 1 or 2 are African-Americans. The evidence also showed that while between 17 to 21 people worked in Star Enterprise's Port Arthur facility's Human Resources Department, Smith was the only African-American in that department since 1984. Despite having high qualifications, a Master's Degree in Public Administration with

an emphasis in Budgeting and Personnel Services, Smith was the only employee in the Star Enterprise's Port Arthur facility's Human Resources Department who has not been promoted since 1985, a period of 11 years. Other persons who are caucasian, but with less educational background and with less seniority have been promoted, received raises, and given supervisory positions during those 11 years. But not Smith.

The evidence also showed that even as the state court issued its TRO on December 6, 1996, Star Enterprise attempted to move certain files from the "Old Records Room" in the Port Arthur plant to Tulsa, Oklahoma. The record indicates that but for Smith's efforts to enforce the TRO, Star Enterprise would have moved out of Texas to a Texaco records storage facility in Tulsa, Oklahoma certain employment records, possibly essential for making Smith's case, and certainly relevant to the claim or the defense. Texaco has the exclusive control of the Tulsa records center.

Discussion

1. This Case was Properly Removed to Federal Court

A defendant may remove a state court action to federal court if such an action could have been filed in the federal court originally. 28 U.S.C. §1441; *Aaron v. National Union Fire Ins. Co.*, 876 F. 2d 1157, 1160-1161 (5th Cir. 1989). When, as in the present case, there is no diversity jurisdiction, a federal question must appear on the face of the plaintiff's "well-pleaded complaint" for removal to be proper. *Id.*; *see also Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F. 3d 362, 366 (5th Cir. 1995) ("A defendant . . . must show that a federal right is an element, and an essential one, of the plaintiff's cause of action.") (citations

omitted). The general rule, thus, is that a federal defense to a state law claim does not create removal jurisdiction. *Aaron*, 876 F. 2d at 1161.

In the present case, the plaintiff's pleading in the state court action, on its face, asserts an essentially federal claim. (See Appendix) The relevant portion of the plaintiff's pleading alleges:

> Defendants have engaged and are continuing to engage in unfair and racially motivated discriminatory practices against Plaintiff and other African-American employees of Star Enterprise. There are discriminatory practices and policies at Defendants' facilities that determine promotions, advancement opportunities and compensation which **apply Company-wide throughout the United States.** The specific practice includes "facially-neutral" decision-making systems that, in their application, have a disproportionate adverse impact on African-American employees.

Plaintiff's Application for Temporary Restraining Order at III (emphasis added).

Defendants properly point out that the above-quoted allegation states a cause of action which is exclusively federal in nature. 42 U.S.C. § 1981 makes it unlawful for an employer to discriminate on the basis of race in promotion and wage decisions. *Page v. U.S. Industries*, 726 F. 2d 1038 (5th Cir. 1984); *Boykin v. Georgia Pacific Corp.*, 706 F.2d 1384 (5th Cir. 1983). A prima facie case of such racial discrimination may be shown by demonstrating that African-Americans are "disparately impacted" by the employer's wage and promotion policies; that

is, "Where gross statistical disparities can be shown, they alone may . . . constitute prima facie proof of a pattern or practice of discrimination."[1] *Boykin*, 706 F.2d at 1390 (quoting *Hazelwood School Dist. V. United States*, 433 U.S. 299, 307-08, 97 S. Ct. 2736, 2741 (1977)).

Indeed, when the plaintiff alleges that Star Enterprise's promotion policies where determined by:

> **'facially-neutral' decision-making systems that, in their application, have a disproportionate adverse impact on African-American employees,**

he conforms perfectly to the Fifth Circuit's requirements for pleading the issue of disparate impact under section 1981:

> **A prima facie case of disparate impact must be shown by identification of a neutral employment practice coupled with proof of its discriminatory impact on one class of employees in the employer's workforce.**

---

1. This court is aware that Title VII also prohibits discrimination in employment on the basis of race. *See* 42 U.S.C. §2000e. However, Title VII establishes an administrative procedure — i) file timely charge with the EEOC; ii) receive notice of right to sue — which a complaining employee must follow before filing a lawsuit in federal court. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47, 94 S. Ct. 1011, 1019 (1974); 42 U.S.C. §2000e-5(b), (c), (e). Because the plaintiff failed to plead the procedural prerequisites for a federal lawsuit under Title VII, this court cannot construe a plausible federal question over this lawsuit under Title VII. However, a disparate impact claim may be made under section 1981 even if such a claim may not be brought pursuant to Title VII. *Page v. U.S. Industries, Inc.*, 726 F.2d 1038, 1041 n.2 (5th Cir. 1984).

Page, 726 F. 2d at 1053 (emphasis added). Accordingly, a section 1981 claim is clearly discernable from the face of the plaintiff's pleadings.

While the plaintiff argues that there is no federal question jurisdiction because an employment discrimination case may be brought under the Texas Commission on Human Rights Act (TCHRA), Tex. Lab. Code Ann. §§21.001 et seq., it is fatal to his argument that he alleges that Star Enterprise's discrimination practices were **"Company-wide throughout the United States,"**[2] while TCHRA pertains to Texas employers only. Tex. Lab. Code Ann. §§21.001. Thus, a federal question, specifically a section 1981 claim, necessarily appears on the face of the plaintiff's pleading. Therefore, the plaintiff's Motion to Remand is in all things denied.

2. Preliminary Injunction

This court may grant a preliminary injunction if: "(1) the movant has a substantial likelihood of eventual success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs the damage which the injunction may cause the opponent; and (4) the injunction would not be adverse to the public interest." *Productos Carnic, S.A. v. Cent. Am. Beef, Etc.*, 621 F.2d 683 (5th Cir. 1980).

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2. During a hearing before this court the plaintiff has alleged that such discriminatory practices may occur not merely in Port Arthur, Texas, but also at Star Enterprise's refineries in Delaware City, Delaware, and Convent, Louisiana, and in Star Enterprise's principal marketing facility in Atlanta, Georgia.

Appendix C

a. Success on the Merits.

The court finds that the evidence presented at the hearing on December 20, 1996 shows that the plaintiff met his burden of showing a likelihood of success on the merits. Statistical evidence may be used to prove that a subjective promotional system has a classwide discriminatory impact. *Page*, 726 F. 2d at 1046-1047. This court finds it startling that of at least 50 people in Star Enterprise's nationwide human resources group only one or possibly two are African-Americans. Though there were between 17 to 21 people in the Star Enterprise's Port Arthur facility's Human Resources Department, Smith was the only African-American to work in that department since 1984. Despite having high qualifications, a Master's Degree in Public Administration with an emphasis in Budgeting and Personnel Services, Smith, who is forty-two was the only employee in the Star Enterprise's Port Arthur facility's Human Resources Department who has not been promoted since 1985, a period of 11 years.[3] At the very least, this court is persuaded that there is a substantial likelihood that Smith will succeed on the merits were he to bring a section 1981 claim.

b. Irreparable Injury.

The evidence before this court indicates that on December 6, 1996, or the day on which the state court issued its TRO, Star Enterprise has attempted to move certain files from its "Old Records Room" in the Port Arthur refinery to Tulsa, Oklahoma

3. Even if *Brown v. Board of Education*, 349 U.S. 294, 75 S. Ct. 753 (1955) (decided when the plaintiff was an infant), had eradicated race discrimination once and for all (wishful thinking) this court cannot help but wonder that given the evidence before it whether Smith, 42, could possibly assert a cognizable claim of age discrimination.

for storage in the Texaco records center. The evidence shows that the files which Star Enterprises attempted to move might have been essential for making the plaintiff's case. It is also clear that but for Smith notifying Star Enterprise of the state court's TRO, documents which could prove his case would have been removed from Port Arthur, Texas. If any documents relevant to the plaintiff's discrimination claim are removed, destroyed, or altered, the plaintiff and the class he anticipates he will represent will likely suffer irreparable harm in proving their racial discrimination claim.

c. Balancing the Equities.

Defendants argue that compliance with the injunction might cause more harm than good, viz. disruption of ordinary business activity. To accommodate the defendants' concerns, the court will modify the original state court TRO to permit the moving of certain documents, and certain notations concerning payroll, if doing so is in the ordinary and usual course of the defendants' business; provided, however, that the plaintiffs' rights to inspect documents relevant to their race discrimination case shall not be impaired. Moreover, to mitigate the high costs associated with electronic document storage, the court will permit defendants to delete electronic records in the ordinary and usual course of business; provided, however, that hard copy records be made and kept of any and all electronic records of the various Human Resources records, as well as any new data used to report various actions, and the status of employees to any governmental authority, state local, or federal, if the defendants choose to delete such records. With such modifications, the threat of harm to the plaintiffs outweighs any harm to the defendants which the injunction might cause.

Appendix C

d. Public Policy

Sound public policy abhors racial discrimination in employment promotions. Indeed, such discrimination is insidious, and violates our sense of human decency. Accordingly, an injunction which would enable the plaintiff to litigate fully and adequately his race discrimination claim fosters sound public policy.

Conclusion

For the reasons given above, the plaintiffs' Motion to Remand is in all things denied and the defendants' Motions to Dissolve the Temporary Restraining Order and Deny a Temporary Injunction are denied.

Signed this 2nd day of January, 1997.

s/ Howell Cobb
Howell Cobb
United States District Judge

Appendix C

Appendix

42 U.S.C. § 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States **shall have the same right in every State and Territory to make and enforce contracts** . . . and to the **full and equal benefit** of all laws and proceedings for the security of persons and property as is **enjoyed by white citizens** . . .

(b) "Make and enforce contracts" defined

For purposes of this section, the term **"make and enforce contracts"** includes the **making, performance, modification, and termination of contracts**, and the **enjoyment of all benefits, privileges, terms, and conditions of contractual relationship.**

(c) Protection against impairment

The rights protected by this section are protected **against impairment by nongovernmental discrimination** and impairment under color of State law.

Paragraph III of Plaintiff's Petition

Defendants have engaged and are continuing to engage in **unfair and racially motivated discriminatory**

practices against Plaintiff and other African-American employees of Star Enterprise. There are **discriminatory practices** and policies at Defendants' facilities that **determine promotions, advancement opportunities and compensation** which apply Company-wide **throughout the United States**. The specific practice includes "facially-neutral" decision-making systems that, in their application, have a disproportionate **adverse impact on African-American employees**. More specifically Plaintiff, Matthews Smith has been subjected to discriminatory practices and policies in Defendants' evaluation system, job posting, compensation/pay-grade systems and promotions. By using these discriminatory practices and policies, Defendants have engaged in a **pattern and practice of intentional discrimination against Plaintiff and other African-American employees of Star Enterprise.**

APPENDIX D — DOCUMENT PRESERVATION ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION FILED MARCH 4, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

1:96-CV-0749

MATTHEWS SMITH, ET AL,

vs.

TEXACO INC., AND STAR ENTERPRISE

Document Preservation Order

Background

Before the court is the motion of plaintiffs Matthews Smith, et al, seeking a document preservation order. *See Manual on Complex Litigation* (3d Ed. 1995) §§ 21.442, 41.34, and § 33,53 at pp. 352 and 353. The court has considered all of the parties' written submissions and heard their oral argument. The plaintiffs' motion is in all things GRANTED.

This is one of three Document Preservation Orders entered this date in this action. None of the three orders shall be considered by the parties or by this court as a motion to produce any of the "Preserved Documents," or requiring any discovery until a discovery order is entered by the court after either agreement of the parties, or upon motion and hearing, if necessary. Compliance by the parties with this order shall not

be construed to waive any claims of confidentiality or privilege which any of the parties may make during the pendency of this case.

I. Definitions

1. "Texaco." The term "Texaco" means defendant Texaco, Inc., including defendant Texaco Inc.'s agents, servants, and any other person or entity acting for or on behalf of defendant Texaco Inc., or any person or entity having actual or constructive notice of this order.

2. "Preserved Documents." The term "Preserved Documents" means all documents, including documents in hard copy, drafts of documents (which can, and often do, evidence subjective intent), documents stored in computer memory, or electronic mail messages to or from Texaco, which relate to any claims based on the alleged racially discriminatory practices or defenses thereto, specifically including all documents relating to: i) promotions, ii) demotions, iii) compensation, iv) training, v) job assignments, vi) job transfers, vii) performance or character evaluations, viii) decisions to hire or terminate employment, and ix) all alleged claims of retaliation by Texaco and Star Enterprise against African-American employees, who have attempted to obtain managerial, supervisory, or professional positions with Star Enterprise.

"Preserved Documents" do not include Texaco's electronic back-up system, voice mail messages, and additional copies of an original document upon which no further information has been noted and no existing information has been deleted.

Appendix D

II. Texaco's Duties with Respect to Preserved Documents

1. Texaco shall not destroy, alter, amend, change, delete, or make any new notations on Preserved Documents retained by Texaco as of the date of this order except as provided in Sections II.2 and II.3.

2. Texaco may elect to keep Preserved Documents received or sent in electronic mail form, or stored in computer memory, in either electronic or hard copy form.

3. Texaco may make any new additions to or notations on Preserved Documents which Texaco makes in its usual and ordinary course of business, as determined by both industry standards and any internal business standards or policies which Texaco has previously imposed on itself.

III. Moving of Preserved Documents

1. Texaco may move Preserved Documents only if doing so is necessary to advance Texaco's usual and ordinary business purposes, as determined by both industry standards and any internal business standards or policies which Texaco has previously imposed on itself.

2. Texaco shall prepare, keep, and preserve logs of any and all Texaco documents, which have been moved or which will be moved *from* Star Enterprise's record storage facilities in Texas, Louisiana, Delaware, and Georgia *to* Texaco's facility in Tulsa, Oklahoma. The logs shall be in the usual format that Texaco uses to log and index its documents, and no additional "logging and indexing" will be required. However, both Texaco and Star Enterprise shall retain any and all originals and copies of logs

or indexes generated by Texaco's usual and ordinary methods of "logging and indexing."

IV. Objections to Inefficient Record Keeping

1. Any party contending the Document Control Orders entered by the court are unduly burdensome, expensive, inappropriate, or incapable of being adhered to, may file a motion requesting the court to designate an electronic systems analyst to review the electronic communications system, the information sought to be protected and retained, and the objectives of this order; and thereafter, to report to the parties and to the court his or her recommendations for the most efficient means and methods to be employed and effectuated at the lowest possible cost to the parties, and the least burdensome upon the ongoing operations of Star Enterprise and Texaco.

V. Initial Disclosure

1. Within 20 days of this order, counsel for each party will submit to opposing counsel a plan for complying with initial disclosure requirements of the Local Rules of the United States District Court, Eastern District of Texas. Such initial disclosure shall be completed by May 1, 1997, unless otherwise ordered by the court. The logs of documents referred to in Section III will be produced upon their completion by Texaco, which may take somewhat more time. If a party objects to the initial disclosure proposed, the court may schedule a hearing to resolve such objections.

Appendix D

VI. Changes and Clarifications

1. Any party may seek changes or clarification of this order by motion to the court, upon good cause shown.

Signed this 4th day of March, 1997.

s/ Howell Cobb
HOWELL COBB
UNITED STATES DISTRICT JUDGE

APPENDIX E — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 5, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-40087

MATTHEWS SMITH

Plaintiff - Appellee

v.

TEXACO, INC; Et Al

Defendants

STAR ENTERPRISE; TEXACO, INC

Defendant - Appellant

Appeals from the United States District Court for the Eastern District of Texas, Beaumont

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 6/3/97, 5 Cir., _____, _____ F.3d _____)

Before WIENER and PARKER, Circuit Judges, and LITTLE, District Judge.*

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*United States District Judge for the Western District of Louisiana, sitting by designation.

Appendix E

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

* * *

ENTERED FOR THE COURT:

s/ illegible
United States Circuit Judge

APPENDIX F — SCHEDULING ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY IN THE MATTER OF *IN RE THE PRUDENTIAL INSURANCE COMPANY OF AMERICA SALES PRACTICES LITIGATION*, MASTER DOCKET NO. 95-4704 ENTERED SEPTEMBER 15, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MASTER DOCKET NO. 95-4704
(Multi District Litigation No. DL-1061)

In re THE PRUDENTIAL INSURANCE COMPANY OF AMERICA SALES PRACTICES LITIGATION

SCHEDULING ORDER

It appearing that the cases listed on Attachment A may merit special attention as complex litigation, it is on this 15th day of September, 1995, ORDERED as follows:

1. *Initial Conference.* All parties shall appear for a conference with the undersigned on the 13th day of October, 1995, at 11:00 a.m. in Courtroom 4B, Martin Luther King, Jr. Federal Courthouse, 50 Walnut Street, Newark, New Jersey.

(a) *Attendance.* To minimize costs and facilitate a manageable conference, parties are not required to attend the conference, and parties with similar interests are expected to agree to the extent practicable on a single attorney to act on their joint behalf at the conference. A party will not, by designating an attorney to represent its interests at the conference, be precluded from other representation during the litigation; and attendance at the

conference will not waive objections to jurisdiction, venue or service.

(b) *Service List.* This Order is being mailed to the persons on Attachment A, which has been prepared from the list of counsel making appearances with the Judicial Panel on Multidistrict Litigation. Counsel on this list are requested to forward a copy of the Order to other attorneys who should be notified of the conference. A corrected service list will be prepared after the conference.

(c) *Other Participants.* Persons who are not named as parties in this litigation but may later be joined as parties or are parties in related litigation pending in other federal and state courts are invited to attend in person or by counsel.

2. *Purposes; Agenda.* The conference will be held for the purposes specified in U.S. Dist. Ct. Rules, D.N.J., Rules 15(a), 15(b), 15(d), and Fed. R. Civ. P. 26(f), and subject to the sanctions prescribed in Fed. R. Civ. P. 16(f). The items listed in the *Manual for Complex Litigation, Third*, sections 21.21 and 40.1, shall, to the extent applicable, constitute a tentative agenda. Counsel are encouraged to advise the Court as soon as possible of any items that should be added to the agenda.

3. *Preparations for Conference.*

(a) *Procedures for Complex Litigation.* Counsel are expected to familiarize themselves with the *Manual for Complex Litigation, Third*, and be prepared at the conference to suggest procedures that will facilitate the just, speedy, and inexpensive resolution of this litigation.

(b) *Preliminary Reports.* Counsel will submit to the Court by October 6, 1995, a brief written statement indicating their preliminary understanding of the facts involved in the litigation and the critical factual and legal issues. These statements will not be filed with the Clerk, will not be binding, will not waive claims or defenses, and may not be offered in evidence against a party in later proceedings.

(c) *List of Affiliated Companies and Counsel.* To assist the Court in identifying any problems of recusal or disqualification, counsel will submit to the Court by October 6, 1995, a list of companies affiliated with the parties and all counsel associated in the litigation.

(e) *List of Pending Motions.* Counsel's statement shall list all pending motions.

(f) *List of Related Cases.* Counsel's statement shall list all related cases pending in state or federal court and their current status, to the extent known.

4. *Interim Measures.* Unless otherwise ordered by the Court:

(a) *Admission of Counsel.* Attorneys admitted to practice and in good standing in any United States District Court are admitted *pro hac vice* in this litigation. Association of local co-counsel is not required.

(b) *Pleadings.* Each defendant is granted an extension of time for responding by motion or answer to the complaints until a date to be set at the conference.

(c) *Pending and New Discovery*. Pending the conference, all outstanding disclosure and discovery proceedings are stayed and no further discovery shall be initiated. This order does not (1) preclude voluntary informal discovery regarding the identification and location of relevant documents and witnesses; (2) preclude parties from stipulating to the conduct of a deposition that has already been scheduled; (3) prevent a party from voluntarily making disclosure, responding to an outstanding discovery request under Fed. R. Civ. P. 33, 34 or 36; or (4) authorize a party to suspend its efforts in gathering information needed to respond to a request under Fed. R. Civ. P. 33, 34 or 36. Relief from this stay may be granted for good cause shown, such as the ill health of a proposed deponent.

(d) *Preservation of Records*. Each party shall preserve all documents and other records containing information potentially relevant to the subject matter of this litigation. Each party shall also preserve any physical evidence or potential evidence and shall not conduct any testing that alters the physical evidence without notifying opposing counsel and, unless counsel stipulate to the test, without obtaining the Court's permission to conduct the test. Subject to further order of the Court, parties may continue routine erasures of computerized data pursuant to existing programs, but they shall (1) immediately notify opposing counsel about such programs and (2) preserve any printouts of such data. Requests for relief from this directive will receive prompt attention from the Court.

(e) *Motions*. No motion shall be filed under Fed. R. Civ. P. 11, 12 or 56 without leave of Court and unless it includes a certificate that the movant has conferred with opposing

counsel in a good faith effort to resolve the matter without Court action.

(f) *Order of Transferor Courts.* All orders by transferor courts imposing dates for pleadings or discovery are vacated.

5. *Later Filed Cases.* This Order shall also apply to related cases later filed in, removed to, or transferred to this Court.

s/ Alfred M. Wolin
ALFRED M. WOLIN, U.S.D.J.

Appendix F

ATTACHMENT A

In re THE PRUDENTIAL INSURANCE COMPANY OF AMERICA SALES PRACTICES LITIGATION
Multidistrict Litigation No. 1061
MASTER DOCKET NO. 96-4704

ARIZONA

Lujan v. Prudential - No. 4-95-207

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CONNECTICUT

Kuchas v. Prudential - No. 3-95-353

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FLORIDA MIDDLE

Young v. Prudential - No. 3-95-348

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ILLINOIS SOUTHERN

Harris v. Prudential - No. 3-95-203

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Nicholson v. Prudential - No. 3-95-206

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Schulte v. Prudential - No. 3-95-412

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Weaver v. Prudential - No. 3-95-138

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KENTUCKY WESTERN

Gordon v. Prudential - No. 5-95-147

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Martin v. Prudential - No. 5-95-30

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MINNESOTA

Amlee v. Prudential - No. 3-95-380

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NEW JERSEY

Dorfner v. Prudential - No. 2-95-1107
Groth v. Prudential - No. 2-95-1104

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Wachtler v. Prudential - No. 2-95-2473

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Zoller v. Prudential - No. 2-95-1093

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NEW YORK SOUTHERN

Dugan v. Prudential - No. 1-94-1195

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NEW YORK WESTERN

Hunter v. Prudential - No. 1-95-364

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OHIO NORTHERN

Krell v. Prudential - No. 3-95-7419

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PENNSYLVANIA WESTERN

Price v. Prudential - No. 2-94-75

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WEST VIRGINIA NORTHERN

Kittle v. Prudential - No. 1-95-96

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(2) (2)

Nos. 97-762, 97-770

Supreme Court, U.S.
FILED
DEC 3 1997

In The

Supreme Court of the United States

October Term, 1997

STAR ENTERPRISE,

Petitioner,

-and-

TEXACO, INC.,

Petitioner,

vs.

MATTHEWS SMITH, *et al.*,

Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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JOHN COWAN
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QUESTIONS PRESENTED

Whether federal courts have the power to issue property-freeze injunctions when the affected property consists of documents and electronically stored information containing evidence relevant to a pending civil action. (Texaco, Inc.'s Question).

Whether an injunction or document preservation order constitutes a prior restraint on free speech in violation of the First Amendment. (Star Enterprise's Question 1).

Whether a district court is authorized to use a document preservation order to affect future communications. (Star Enterprise's Question 2).

Whether the district court erred in granting an overly broad preliminary injunction and then reissued it in modified form despite Smith's failure to meet the requirements for an injunction. (Star Enterprise's Question 3).

PARTIES TO THE PROCEEDINGS

The petitions accurately list the parties to the proceedings

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Dale A. Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 Tex. L. Rev. 1185 (1983) 7

Lawrence B. Solum and Stephen J. Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 Emory L. J. 1085 (1987) 7, 8

The Respondents, Matthews Smith, *et al.* ("Smith"), respectfully file this combined brief in opposition to the petitions of Texaco, Inc. ("Texaco") and Star Enterprise ("Star").

STATEMENT OF THE CASE

This is a race discrimination case originally filed by Matthews Smith against Star and Texaco. The primary issue on appeal is whether a federal district court has the authority to require a party refrain from destroying evidence.

Matthews Smith went to work for Texaco in 1980. (2 R. 6). In 1989, Star was formed as a joint venture of an indirect subsidiary of Texaco and Saudi Refining, Inc. Smith went to work for Star at that time. Although Star and Texaco are nominally separate entities, they maintain a close working relationship, and Star employees have always considered themselves to be Texaco employees. (2 R. 12, 46-47, 58, 72, 75, 97). In particular, Star and Texaco share an employee assessment and advancement system that has been the subject of race discrimination litigation for several years.

In 1994, Smith contacted lawyers pursuing an employment discrimination class against Texaco. (2 R. 11). Because of the close relationship between Star and Texaco, Smith expected to be included in that action (2 R. 11-12), but a few days before that case settled, Smith was informed that Star employees had been excluded from the class. (2 R. 9). Shortly thereafter, Smith learned Texaco was removing documents from Star's premises. (2 R. 16). At that point, based on the widely publicized allegations that high-ranking Texaco executives had discussed destroying evidence in the other action, Smith sought to prevent any such document destruction at Star. (2 R. 16-17).

Smith sought and obtained a state court temporary

restraining order (TRO)[1] prohibiting the destruction, alteration, or transportation of documents relevant to his racial discrimination claims. After Smith obtained the state court TRO, he learned that Texaco employees, without interference from the Star manager, were still loading documents into trucks in violation of the TRO.[2] (2 R. 23).

Star then removed Smith's action to federal court, alleging federal question jurisdiction under 28 U.S.C. § 1331 based on a theory that the state court petition raises federal questions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* and Section 1981 of the Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981. (1 R. 1-3). Smith filed a motion to remand, alleging that his state court petition did not state a federal claim. The district court ultimately determined that Smith's petition stated a claim under § 1981 and denied the motion. *Smith v. Texaco*, 951 F. Supp. 109 (E.D. Tex. 1997).

Texaco filed a motion to dissolve the state court TRO. (1 R. 80-86). The next day, the district court entered an order modifying the TRO, requiring Smith to post bond and setting a date for a preliminary injunction hearing. The court held a

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1. Smith obtained the TRO in anticipation of a lawsuit to be filed after he had exhausted his administrative remedies under the Texas Commission on Human Rights Act and Title VII. Smith originally sought injunctive relief rather than a document preservation order because he regarded the race discrimination lawsuit as premature.

2. Star allowed Texaco employees to move documents in violation of a court order. (2 R. 23). Petitioners have not claimed that it was permissible to move the documents because they do not relate to Smith's discrimination charges. Rather, the Petitioners admitted that they did not know exactly what was in the boxes they were moving, and Star's human resources director conceded that there were probably records in the old records room that the Plaintiffs should review. (2 R. 102).

hearing, and, finding that the prerequisites for an injunction had been met, issued a memorandum opinion and order granting the preliminary injunction. (1 R. 169-182). Star and Texaco filed notices of appeal. (1 R. 208-209, 210-11).

Both Texaco and Star filed motions to stay the preliminary injunction in the district court, which were denied (1 R. 186-196, 199-207, 238-41), and then in the Fifth Circuit. Smith and others then filed Plaintiffs' First Amended Complaint, formally alleging various violations of 42 U.S.C. § 1981, and seeking class certification. (1 Supp. R. 21-36). Smith then requested document preservation orders as recommended in the *Manual for Complex Litigation*. (1 Supp. R. 37-40). Shortly thereafter, the Fifth Circuit entered an order granting Appellants' motions to stay the preliminary injunction without prejudice to any discovery order that the district court might enter.

After holding a hearing (2 Supp. R.), the district court entered three document preservation orders. (1 Supp. R. 129-38). Star and Texaco appealed the document preservation orders, (1 Supp. R. 158-74, 201), and filed motions to stay, which the Fifth Circuit denied.

The Fifth Circuit heard oral argument and ruled from the bench, affirming without opinion. Star filed a motion for panel rehearing and Texaco filed a suggestion for rehearing *en banc*, both of which were denied.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO REASON TO GRANT THE PETITIONS.

The district court's order was affirmed without opinion, which means that the court of appeals determined that an opinion would have no precedential value. 5th Cir. R. 47.6. Moreover, the "opinion" was unpublished, and carries no precedential value in unrelated cases. 5th Cir. R. 47.5.5. A nonopinion with no precedential value could be wrongly decided, but it cannot create a conflict among the circuits, or with Supreme Court precedent. Moreover, even if the Fifth Circuit had set out its reasons for ruling as it did, there would still be no conflict because no federal appellate court has ever endorsed the positions taken by the Petitioners in this case. The district court correctly applied the law, and the Fifth Circuit correctly affirmed.

In addition, most of the arguments put forth by the Petitioners were not timely raised. Absent manifest injustice, the Fifth Circuit does not consider arguments belatedly raised after appellees have filed their brief. *Najarro v. First Fed. Sav. & Loan*, 918 F.2d 513, 516 (5th Cir. 1990). The general rule in the Fifth Circuit is that if an argument is not raised in a party's principal brief, it is waived. *E.g., id.*; *Stephens v. C.I.T. Group/ Equip. Fin., Inc.*, 955 F.2d 1023, 1026 (5th Cir. 1992); *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540 (5th Cir. 1991).

In its principal brief, Texaco argued that the prerequisites for an injunction had not been met. Texaco went on to argue that a document preservation order is really an injunction, and that the district court lacked authority to enter a document preservation order without complying with Rule 65 and other

requirements for an injunction. Texaco did not challenge the district court's authority to prohibit by injunction the destruction of documents on a proper showing. Although Texaco discussed the inherent powers of federal courts and the limits of equity, it did so only in the context of a document preservation order entered in the absence of the evidentiary showing required for an injunction or without complying with Rule 65. Texaco's contention that federal courts lack the authority to issue property freeze injunctions did not appear in writing until Texaco filed its suggestion for rehearing *en banc*.

Star's arguments also are, for the most part, untimely. Star argued in its principal brief that the requirements for an injunction had not been met, and that the document preservation order was subject to the same standards as an injunction. Star's first two questions presented — the First Amendment prior restraint argument and the future communications argument — appeared in writing at the earliest in Star's Petition for Panel Rehearing. Only Star's third question presented — whether the court erred in granting an overly broad injunction and then reissuing it in modified form as a document preservation order without first meeting the requirements of an injunction — was even arguably properly and timely raised in the court of appeals. Furthermore, many of Star's complaints in its principal brief that could be put down to overbreadth challenges referred specifically to a preliminary injunction that has since been dissolved, not the more narrowly tailored document preservation order that remains in effect.

In sum, the decision of the court of appeals set no precedent and created no conflicts, and the only asserted error that was properly presented to the court of appeals consists of allegedly erroneous factual findings or the misapplication of a correctly stated rule of law. Applying the principles set out in Sup. Ct. R. 10, this case is simply not "certworthy."

II.

THERE IS NO ERROR IN THE FIFTH CIRCUIT'S APPLICATION OF THE LAW TO THE FACTS OF THIS CASE.

A. Federal Courts Have The Authority To Enter Document Preservation Orders.

The district court has within its inherent powers those powers necessary to protect the efficient and orderly administration of justice. *Roadway Express v. Piper*, 447 U.S. 752, 764, 100 S. Ct. 2455, 2463 (1980); *In re Stone*, 986 F.2d 898, 902 (5th Cir. 1993). The preservation of documents and their availability for production is essential to the orderly and expeditious disposition of litigation. *In re Prudential Ins. Co. of America Sales Practices Litig.*, 169 F.R.D. 598, 599 (D.N.J. 1997). Courts' equitable powers regarding destruction of documents are longstanding; the power of chancery in England extended to cases of spoliation of papers. *Gaines v. Chew*, 43 U.S. (Howe) 619, 629 (1844).[3] Moreover, Rule 34 of the Federal Rules of Civil Procedure vests in the district court discretion whether and within what limits and under what conditions the inspection of documents or things should be ordered. 8A Wright, Miller & Marcus, *Federal Practice and Procedure* § 2215, p. 444 (2d 1994); *Swanner v. United States*, 406 F.2d 716, 719 (5th Cir. 1969). If the district court can order a document produced, or sanction a party for failing to preserve it, the court obviously can also order the document preserved.

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3. In footnote 18 of its petition for certiorari, Texaco cites *Gaines*, 43 U.S. (Howe) at 629, as "explaining that at English common law the power of the chancery extended to drawing an adverse inference because of the spoliation of papers." *Gaines* says "The power of chancery in England extends to cases of spoliation of papers, but not to setting up a will of personalty." *Gaines* says nothing about that power consisting of or being limited to drawing an adverse inference.

Document preservation orders are not controversial. In fact, such orders are common in complex litigation. *See, e.g., In re Prudential Ins. Co. of America Sales Practices Litig.*, 169 F.R.D. at 599 (stating that "the preservation of documents and their availability for production is essential to the orderly and expeditious disposition of litigation"); *HBJ, Inc. v. American Home Products Corp.*, 1994 WL 31005 (N.D. Ill. February 1, 1994) (stating that document preservation orders are common in complex litigation); *In re Continental Ill. Sec. Litig.*, 750 F. Supp. 868, 881-882 (N.D. Ill. 1990) (reducing attorneys fees by 75% for pretrial matters such as document preservation orders which are "entered routinely in complex federal litigation"); *In re Wirebound Boxes Antitrust Litig.*, 128 F.R.D. 250 (D. Minn. 1989) (document preservation order consisted on one paragraph of management order); *Wm. T. Thompson Co. v. General Nutrition Corp.*, 104 F.R.D. 119, 121 (C.D. Ca. 1985) (imposing sanction for violation of oral document preservation entered by master); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 750 (E.D.N.Y. 1980) (discussing document preservation order); *Manual for Complex Litigation*, § 21.442, p. 75 (3d ed. 1995) (recommending document preservation and retention orders); Lawrence B. Solum and Stephen J. Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 Emory L. J. 1085, 1094 n.14 (1987) ("Such orders are common, and their violation is a sufficient basis for imposition of discovery sanctions"). Neither Texaco nor Star has cited a single case, treatise, article, or book in which a court or commentator has so much as entertained the idea that federal courts lack the power to order a party to refrain from destroying evidence.[4] The

4. Texaco claims in footnote 12 that a "passionate proponent" of document preservation orders ridiculed arguments that the power to enter such orders can be distilled from the Federal Rules of Civil Procedure, and cites Dale A. Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 Tex. L. Rev. 1185 (1983). Texaco's assertion might charitably be attributed to (Cont'd)

most Texaco or Star has been able to do is point to a mild controversy over whether such orders are essentially injunctive, and therefore subject to the requirements of Rule an injunction, or whether they are run-of-the-mill discovery orders.[5]

Nor is there any controversy over the court's power to, as the Petitioners put it, "criminalize" the destruction of evidence by making it punishable by contempt. Numerous federal appellate courts have held that a party can be sanctioned under the court's inherent powers for destroying documents *even in the absence of a document preservation order. E.g., Shepperd v. American Broadcasting Co., Inc.*, 64 F.3d 1469 (D.C. Cir. 1995); *Schmidt v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76 (3rd Cir. 1994); *Uniguard Sec. Ins. Co. v. Lakewood Eng'g & MFG Corp.*,

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(Cont'd)
a remarkably inept misreading if the error had not been pointed out in the briefing before the court of appeals. Professor Oesterle's criticisms were aimed at courts sanctioning parties under Rule 37 for destroying documents *in the absence of a document preservation order*. Professor Oesterle did not question a court's power to impose a document preservation order, and observed that, although document preservation orders do not address prefiling document destruction, they do "avoid the apparent deficiency in Rule 37 for most postfiling document destruction if litigants can convince the judge to enter an order promptly." *Id.* at 1225. Other commentators agree. *See, e.g.*, Iain D. Johnston, *Federal Courts' Authority to Impose Sanctions for Prelitigation or Preorder Spoliation of Evidence*, 156 F.R.D. 313 (1994); Lawrence B. Solum and Stephen J. Marzen, *Truth and Uncertainty: Legal Control of the Destruction Of Evidence*, 36 Emory L. J. at 1094 n.14.

5. A few district court cases have analyzed document preservation orders as injunctions. *See Pepsi-Cola Bottling Company of Olean v. Cargill, Inc.*, 1995 WL 783610 *3 (D. Minn., Oct. 20, 1995); *In re Potash Antitrust Litig.*, 1994 LEXIS 20836 (D. Minn. Dec. 5, 1994); *Humble Oil & Ref. Co. v. Harang*, 262 F. Supp. 39, 42 (E.D. La. 1966); *Cunningham v. Bower*, 1989 WL 35993 (D. Kan. 1989).

982 F.2d 363 (9th Cir. 1992); *see also Pressey v. Patterson*, 898 F.2d 1018 (5th Cir. 1990). The only controversy is over whether that power comes from the court's inherent powers or from Rule 37.[6]

Document preservation orders are especially appropriate in race discrimination cases. The *Manual for Complex Litigation* recommends that

> [b]efore the commencement of discovery — and perhaps before the initial conference — the court should consider whether to enter an order requiring the parties to preserve and retain documents, files, and records that may be relevant to the litigation.

Manual for Complex Litigation, § 21.442, p. 75 (3d ed. 1995). In the context of civil rights litigation, where EEOC regulations require an employer faced with an allegation of discrimination to "preserve all records relevant to the charge or action until final resolution of the charge or action," 29 C.F.R. § 1602.14 (1996), the *Manual* points out that

> [t]he parties may disagree on which records are covered by this mandate, particularly with respect to computerized data that may be periodically erased as new information is electronically stored. A separate order of the court may be needed both to clarify what records must be preserved and to provide relief from unduly burdensome retention requirements.

Manual for Complex Litigation, § 33.53, p. 352-53 (3d ed. 1995).

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6. *See, e.g.*, Iain D. Johnston, *Federal Courts' Authority to Impose Sanctions for Prelitigation or Preorder Spoliation of Evidence*, 156 F.R.D. 313 (1994).

In addition to providing a sound basis for imposing appropriate sanctions for the destruction of evidence, document preservation orders are the only effective disincentive to a party's cavalierly allowing evidence to be "accidentally" or "inadvertently" destroyed. For instance, EEOC regulations forbid an employer from destroying any documents related to the claims of a charging party, 29 C.F.R. § 1602.14, but the EEOC's enforcement mechanism only takes effect if the employer knowingly destroys or knowingly fails to maintain records with the intent to defeat the purposes of Title VII, and then the EOS (not the plaintiff) can (not must) recommend (not require) that an "adverse inference" be drawn from the destruction of or failure to maintain evidence, *EEOC Compliance Manual*, § 632.3(b)(2)(ii). Nor does the case law on spoliation provide an adequate remedy. In the absence of a document preservation order or injunction, courts typically require that the document destruction be intentional or in bad faith. *E.g., Eaton Corp. v. Appliance Valves Corp.*, 790 F.2d 874, 878 (Fed. Cir. 1986) (bad faith required for a negative inference); *Jackson v. Harvard Univ.*, 721 F. Supp. 1397, 1413 (D. Mass.), *aff'd*, 900 F.2d 464 (1st Cir.), *cert. denied*, 498 U.S. 848 (1990) (intentional destruction required for adverse inference). A court order or injunction, on the other hand, imposes an affirmative duty on corporate management to ensure that documents are not "inadvertently" destroyed in the usual course of business. *See In re Prudential Ins. Co. of America Sales Practices Litig.*, 169 F.R.D. 598 (D.N.J. 1997).

B. The Fifth Circuit's Decision Does Not Conflict With *De Beers*.

Texaco claims that federal courts lack the power to enter "property freeze injunctions." The district court found and concluded that the requirements for a preliminary injunction were met, and Texaco does not challenge these findings and

conclusions. The issue is not whether document preservation orders are subject to the same rules as injunctions,[7] or whether the district court's findings and conclusions with respect to the propriety of injunctive relief were correct, or whether the preliminary injunction was too broad. The issue is whether under any circumstances a court can enjoin or prohibit a party from destroying evidence.

Texaco cites this Court's decision in *De Beers Consol. Mines v. United States*, 325 U.S. 212 (1945), in support of its argument. In *De Beers*, this Court held that the district court could not use its equity power to freeze an antitrust defendant's assets to ensure the enforceability of a possible fine for contempt if the defendant disobeyed an injunction that the court might issue at the end of the case. In so doing, this Court observed that the assets had nothing to do with the claims being asserted in the case and that the freeze was not interim relief of a kind that might be awarded at the end of the case. *Id.* at 220. The district court injunction in *De Beers* concerned "a matter lying wholly outside the issues in the suit" and was thus inappropriate. *Id.*

The district court's authority to enter document preservation orders in appropriate cases has nothing to do with the issues addressed in *De Beers*. It is not a question of requiring a party to set aside property or post bond to pay a judgment that may or may not ultimately be entered. The court's power to compel the preservation of evidence is central to the court's ability to administer justice. The district court's power to preserve evidence is not "a matter lying wholly outside the issues in the suit," and Texaco can cite no case applying *De Beers* to a situation remotely like the case at bar.

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7. Of course, if Smith is correct that document preservation orders are not injunctions, this issue applies only to the propriety of the now dissolved preliminary injunction and not to the court's authority to enter the document preservation orders.

C. Document Preservation Orders May Apply Prospectively.

Star claims that requiring it to preserve documents such as e-mail violates the First Amendment as a prior restraint on speech. The argument is that Star employees will know that certain communications will be preserved and possibly reviewed by Star management and/or attorneys. The employees may not feel comfortable expressing themselves freely if they know that "Big Brother" (*i.e.*, Star) is looking over their shoulders. In other words, Star claims that it has a right to destroy documents relating to Smith's discrimination claims (which are the only documents required to be preserved) because otherwise Star employees might refrain from e-mailing dirty jokes. While such conduct may, as Star says, be entitled to the highest degree of constitutional protection, it has nothing to do with the document preservation orders. The document preservation order on its face is not a prior restraint on speech. The mere fact that the order may have an incidental effect on free speech does not invalidate it. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665 (1972) (First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability).

EEOC regulations require Star to "preserve all records relevant to the charge or action until final resolution of the charge or action." 29 C.F.R. § 1602.14 (1996).[8] Star does not claim that the EEOC regulations are an unconstitutional prior restraint, or that the government lacks a sufficiently compelling interest to require the preservation of evidence. Star's complaint instead is aimed at speech in no way related to the district court's order.

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8. *The Manual for Complex Litigation* points out that an order such as the district court entered here actually helps a civil rights defendant by clarifying what records must be preserved and providing relief from unduly burdensome retention requirements. *Manual for Complex Litigation*, § 33.53, p. 352-53 (3d ed. 1995).

In other words, with respect to the speech at issue, the order is completely content-neutral, and any chilling would be purely incidental. In contrast, the cases cited by Star dealing with the "chilling effect" of government actions deal with situations in which First Amendment concerns were implicated because the *purpose* of the statute was related to the suppression of free expression; *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1111-12 (D.C. Cir. 1978) (*en banc*) (stating that the strictest scrutiny is applied "where the purpose of a statute is related to the suppression of free expression of ideas or information" and that the legislative history of the statute in question indicated that the purpose of the statute was related to the suppression of speech); or where there was no rational basis for the regulation, *Pentco, Inc. v. Moody*, 474 F. Supp. 1001, 1005 (S.D. Ohio 1978) (no rational basis for requiring disclosure of identities of minor shareholders or limited partners not involved in day-to-day operations of massage parlors). The purpose of the order plainly has a rational basis and is not related to the suppression of free expression of ideas or information — it is related solely to the preservation of evidence for a pending lawsuit.

Moreover, Star's argument proves too much. Star cannot explain how it can comply with EEOC regulations requiring the preservation of documents related to a discrimination charge unless it knows what is in the documents. Presumably, finding out what is in the documents would entail Star management or attorneys reading them. But the possibility that Star managers or attorneys might have read documents is precisely the alleged defect with the document preservation orders. The only difference is that Star knows that it does not have to take EEOC regulations as seriously.

If an order requiring that a party refrain from destroying evidence is an unconstitutional prior restraint on free speech

merely because a person might be less likely to speak if his words became known, then all discovery in every lawsuit is also an unconstitutional prior restraint. Moreover, the alleged "chilling effect" comes not from government scrutiny of Star's documents, but from the possibility that Star might scrutinize its own documents. The problem, if any, is not with the document preservation order, it is with Star's corporate culture.

D. The Fifth Circuit's Decision Is Correct.

Petitioners have maintained that the document preservation orders are really injunctions, and that the court of appeals had jurisdiction under 28 U.S.C. § 1292(a)(1). Smith has maintained that the document preservation orders are non-injunctive discovery orders,[9] and that the court of appeals could exercise jurisdiction over those orders only by treating the appeals as applications for writ of mandamus. *See, e.g., Church of Scientology v. United States*, 113 S. Ct. 447, 452 n.11 (1992)

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9. If an affirmative definition of a § 1292(a)(1) "injunction" must be attempted, it would embrace orders that are directed to a party, enforceable by contempt, and designed to accord or protect "some or all of the substantive relief sought by a complaint" in more than a temporary fashion. No branch of this definition will suffice alone. Many orders directed to a party and enforceable by contempt obviously are not injunctions, such as orders commanding a response to discovery demands.

16 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3922, p. 65-68 (2d 1996) (footnotes omitted). Because preservation of documents is not a part of the substantive relief sought in Plaintiffs' First Amended Complaint, the district court's document preservation order is not immediately appealable as an injunction within the meaning of § 1292(a)(1), but rather is a discovery order entered under the court's inherent authority to protect the orderly and efficient administration of justice.

("As a general rule, a district court's order enforcing a discovery request is not a 'final order' subject to appellate review. A party that seeks to present an objection to a discovery order immediately to a court of appeals must refuse compliance, be held in contempt, and then appeal the contempt order."); *see also Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 101 S. Ct. 669 (1981). It is clear that the court of appeals affirmed the district court's findings and conclusions on the preliminary injunction, which has since been dissolved. It is not clear whether the court of appeals also considered the document preservation orders to be injunctive and affirmed them as well, or considered them to be non-appealable discovery orders that did not meet the requirements for mandamus. Determining whether the preliminary injunction was proper does not, therefore, necessarily put to rest the controversy. Nevertheless, the district court correctly applied the law with respect to the preliminary injunction, and its findings are not clearly erroneous. To the extent the document preservation order can be considered injunctive, it is supported by the same findings and conclusions.

In deciding whether to grant the preliminary injunction, the district court applied the standards set out in *Productos Carnic, S.A. v. Cent. Am. Beef, Etc.*, 621 F.2d 683 (5th Cir. 1980):

> (1) the movant has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs the damage which the injunction may cause the opponent; and (4) the injunction would not be adverse to the public interest.

Star agrees that this is the correct legal standard, but claims in conclusory fashion that Smith failed to make the required showing. The district court's findings are set out in its opinion, and are supported by the record. *See Smith v. Texaco*, 951 F. Supp. 109 (E.D. Tex. 1997).

Star's main objection appears to be its belief that there was no evidence that that there was a danger that any documents would be destroyed. This contention has to be taken with more than just a grain of salt. The only reason the court is reading this brief is that Star wants desperately to destroy many of the documents that had been covered by the district court's preliminary injunction and are now covered by the document preservation order. Star's complaints in its petition for certiorari focus on the requirement that it preserve electronically stored information, but both Star's and Texaco's computer experts testified that documents — e-mail messages in particular — would be destroyed wholesale in the absence of the injunction. For example, Texaco's expert testified that the retention period for e-mail backup tapes is eight weeks, after which the tapes are reused. (2 R. 143-44). Similarly, Star's expert complained that it was a constant fight to get personnel to delete their e-mail and voice messages, and said "we're constantly trying to scrub our files." (2 R. 154). Star's claim that there was no evidence that any documents were in danger of being destroyed is simply not true. As with all the disputed issues raised in the petitions, Star's position finds no support in the facts or in the law.

CONCLUSION

For the reasons stated above, the Petitions should be denied.

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No. 97-770

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In The

Supreme Court of the United States

October Term, 1997

TEXACO, INC.,

Petitioner,

vs.

MATTHEWS SMITH, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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(1) The Fifth Circuit's unpublished opinion in this case of course cannot create a conflict between the circuit courts.[1] But Texaco has never urged a conflict in the circuits as a reason to grant its petition. The company relied on other grounds: (i) the conflict between the district court's orders (and the circuit court's affirmance of those orders) and a decision of this Court; and (ii) the need to settle an unresolved question concerning the power of federal courts, an issue of substantial importance to the civil justice system.

Respondents are simply wrong to say that an unpublished decision cannot be contrary to a decision of this Court.[2] Were it otherwise, lower courts could insulate from final review flagrantly illegal or unconstitutional rulings. That is not, nor could it be, the law.

Moreover, this Court has long reserved to itself the right to grant certiorari in order to provide the lower courts with guidance on a question of substantial importance to the civil justice system.[3] As set out in the petition, just such a question is presented here.[4]

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1. Brief in Opposition at 4.

2. *Id.*

3. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 42 (1991) (addressing scope of courts' inherent powers); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 757 (1980) (same); *Schlagenhauf v. Holder*, 379 U.S. 104, 109 (1964) (considering construction and validity of a rule of civil procedure); *Sacher v. United States*, 343 U.S. 1, 4-5 (1952) (addressing scope of contempt power); ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE §§ 4.11, 4.15 (7th ed. 1993).

4. Petition for a Writ of Certiorari at 11-16.

(2) Texaco insistently raised at every stage of the proceedings below the question of whether the district court had the authority to issue the disputed injunctions. Respondents' suggestion to the contrary is preposterous.[5] Subsection F of Texaco's brief on appeal reads as follows: "The district court lacked authority to make the document-preservation order directed to Texaco."[6] The brief then argues that authority for the district court's orders cannot be found in the MANUAL FOR COMPLEX LITIGATION (*id.* at 22-23), any rule of civil procedure (*id.* at 23-26), or within the ambit of courts' "inherent powers" (*id.* at 26-28). Texaco did argue that the original injunction failed to satisfy traditional requirements for such relief and that the "document-preservation order" was issued without compliance with Rule 65. But those arguments followed and were alternative to the principal lack-of-authority point.

(3) Respondents insist that the power to enjoin free use of a party's property *pendente lite* — so long as the property may contain relevant evidence — derives "obviously" from the federal rules of discovery.[7] They further assert that "[t]he court's [sic] power to compel the preservation of evidence is central to the court's [sic] ability to administer justice."[8] Neither assertion is supported by citation to authority, for good reason: no such authority exists. Courts and commentators have debated whether the power to *sanction* the destruction of evidence is found in the rules of civil procedure or must be grounded in the courts' inherent powers. And some commentators have decried the lack

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5. Brief in Opposition at 4-5.

6. Brief of Defendant-Appellant Texaco, Inc. at 22.

7. Brief in Opposition at 6.

8. *Id.* at 11.

of a rule or statute that would confer the injunctive power claimed by the district court in this action.[9] But nobody has contended that evidence-preservation injunctions are anything other than a recent innovation in American law. If the power to issue such injunctions is as "obvious" and as "central" to the administration of justice as the respondents assert, Texaco can only marvel at their utter invisibility in Anglo-American jurisprudence for over two hundred years.[10]

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9. Dale A. Osterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, TEX. L. REV. 1185, 1239 (1983).

10. *See Entick v. Carrington*, 19 St. Tr. 1030 (1765), which remains good law in England today. The court's reasoning is equally applicable here:

> What would the parliament say, if the judges should take upon themselves to mould an unlawful power into a convenient authority, by new restrictions? That would be, not judgment, but legislation.

19 St. Tr. at 1067.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

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No. 97-770

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STAR ENTERPRISE,

Petitioner,

vs.

MATTHEWS SMITH ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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I. *The Appeal of the Preliminary Injunction is not Moot*

Several times in their opposition brief, Respondents suggest that Star's arguments as to the preliminary injunction are not cognizable because the preliminary injunction was allegedly dissolved by the district court. Brief in Opposition, at 5, 11 n.7, 15. However, in its order to "dissolve" the injunction, the district court stated only that:

> To the extent this court may have jurisdiction of this action while the appeal pends, the preliminary injunction is now DISSOLVED and SET ASIDE.
>
> In the more likely event that this court does not retain jurisdiction while the preliminary injunction is on appeal, the court will forward the plaintiff's motion and this order to the Court of Appeals for the Fifth Circuit for such action as it deems appropriate.
>
> *This court is of the opinion such motion for dissolution should be filed with the Court of Appeals for the Fifth Circuit.*

(emphasis added) (Attached at App.-1). Respondents never filed a motion for dissolution with the Fifth Circuit, nor is there any indication in the record that the Fifth Circuit considered the dissolution of the preliminary injunction in affirming the lower court's decision. Indeed, the district court was correct in assuming that it was without jurisdiction to dissolve the preliminary injunction during the pendency of the appeal of the injunction before the Fifth Circuit. "The filing of a notice of appeal is an event of jurisdictional significance - it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the

appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). Thus, because the district court's dissolution was invalid and the Fifth Circuit failed to address the issue, the status of the preliminary injunction is in question and the injunction may remain in effect.

Even if the district court's dissolution of the preliminary injunction was effective, such dissolution would not moot an appeal of the injunction because Star is entitled to the amount of the bond posted by plaintiff if this Court determines that Star was wrongfully enjoined. *See Continuum Co., Inc. v. Incepts, Inc.*, 873 F.2d 801, 803 (5th Cir. 1989) (stating that bond ensures enjoined party that it may obtain damages, even if movant is insolvent, as long as court determines it was wrongfully enjoined). Thus, questions as to the overbroad and burdensome nature of the preliminary injunction are properly before this Court.

II. *Star's Argument that the Terms of the Preliminary Injunction and the "Document Preservation Order" Constitute an Unconstitutional Prior Restraint on Star's Right of Free Speech Have Not Been Waived*

Respondents claim that Star's First Amendment argument is waived because such argument was not raised until Star's Petition for Panel Rehearing to the Fifth Circuit. Brief of Opposition, at 5. Star has not waived the argument because it made overbreadth arguments as to the preliminary injunction and the document preservation order consistently throughout its briefing in the district and appellate courts. The First Amendment issue is a variation on the overbreadth arguments and the record shows that the substantive concept of overbreadth has been properly presented to this Court. *See Patin v. Allied Signal, Inc.*, 77 F.3d 782, 786 (5th Cir. 1996)

(stating that appellants did not waive complaint in removal proceeding because the "substantive concept" was averted to in both the motions and the hearing).

Further, courts will consider arguments even if belatedly raised when consideration of the issue is necessary to avoid manifest injustice *or* the issue is purely legal. *See Duamutef v. O'Keefe*, 98 F.3d 22, 25 (2d Cir. 1996); *Animal Protection Inst. v. Hodel*, 860 F.2d 920, 927 (9th Cir. 1988). Star's First Amendment overbreadth argument is purely a legal question for this Court to decide. Further, failure to consider this important issue would result in manifest injustice. The First Amendment embodies some of the most precious rights we have as citizens of the United States. As Justice Hugo Black once stated:

> I view the guarantees of the First Amendment as the foundation upon which our governmental structure rests and without which it could not continue to endure as conceived and planned. Freedom to speak and write about public questions is as important to the life of our government as is the heart to the human body. In fact, this privilege is the heart of our government. If that heart be weakened, the result is debilitation; if it be stilled, the result is death.

Drivers v. Meadowmore Dairies, 312 U.S. 287, 301-02 (1942) (Black, J., dissenting).

Star has demonstrated that the effects of the preliminary injunction and the document preservation order will have farreaching effects on the free speech rights of Star Enterprise

and its employees as well as other employees who may be subject to similar injunctive orders. Thus, failure to consider Star's First Amendment argument would result in manifest injustice. *See Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706, 708 n.1 (3d Cir. 1978) (finding that first amendment issue not raised in district court would be considered on appeal because of great public interest).

CONCLUSION

For the foregoing reasons, Star's petition for a writ of certiorari should be granted.

Dated: December 29, 1997
Houston, Texas

Respectfully submitted,

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APPENDIX

Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

FILED-CLERK
U.S. DISTRICT COURT

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BY /s/ Angela Bella

MATTHEWS SMITH, ET AL	§	
V.	§	NO. 1:96-CV-0749
TEXACO INC., AND STAR ENTERPRISE	§	

ORDER

On January 2, 1997, this court granted a preliminary injunction sought by the plaintiffs, restraining and enjoining the defendants from destroying, deleting, altering, or making certain records unavailable to plaintiff, Matthews Smith, an African American employee of Star Enterprise and Texaco Inc., who purports to represent, as class representative, numerous other African American employees of the defendants, allegedly discriminated against by defendants on a racial basis. On January 7, 1997, the order granting the preliminary injunction was appealed to the Court of Appeals for the Fifth Circuit, and on February 14, 1997, that court, upon motion of the defendants, stayed the preliminary injunction until it could hear the appeal upon an expedited basis.

On February 4, 1997, the plaintiffs, with leave of court, filed an amended complaint, adding Karen Love, Darlene Greene, Kenneth Ford, John Lumpkins, and John Comeaux as individual plaintiffs, and seeking class certification under Rule 23, FED. R. CIV. P. for alleged violations of 42 U.S.C.

§ 1981, and 42 U.S.C. § 2000(e) for alleged racial discrimination.

The Court of Appeals for the Fifth Circuit, in the written order, stated the stay was granted, "without prejudice to any discovery order that may be sought during the now-filed lawsuit."

Three Document Preservatrion Orders have now been entered, and the plaintiffs seek to dissolve the January 2, 1997, preliminary injunction. To the extent this court may have jurisdiction of this action while the appeal pends, the preliminary injunction is now DISSOLVED and SET ASIDE.

In the more likely event that this court does not retain jurisdiction while the preliminary injunction is on appeal, the court will forward the plaintiff's motion and this order to the Court of Appeals for the Fifth Circuit for such action as it deems appropriate.

This court is of the opinion such motion for dissolution should be filed with the Court of Appeals for the Fifth Circuit.

SIGNED this 21st day of March, 1997.

/s/ Howell Cobb
HOWELL COBB
UNITED STATES DISTRICT JUDGE